II. THE COMMISSION MUST COMPLY WITH THE SMALL BUSINESS ACT WHEN ESTABLISHING SUBSCRIBER MEASURE AND AFFILIATION STANDARDS THAT DEFINE A "SMALL CABLE COMPANY".

A. The Commission Attempts to Define a Small Company in This Rulemaking.

Congress established the principal definition of a "small cable company:"

> For purposes of this subsection, the term "small cable operator" means a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.[1]

Congress left to the Commission, the important tasks of fleshing out the definition by determining how and when to measure subscribers and to define the relationships that may constitute an "affiliation." These determinations will significantly impact the scope of the definition's applicability and, consequently, the number of affected small cable companies.

B. The Small Business Act Applies to This Proceeding.

The Small Business Act ("SBA") defines a small business as one which is: (1) independently owned and operated; and (2) not dominant in its field of operation.[2] The Commission has generally determined that both cable television operators and telephone companies were not subject to the provisions of the Small Business Act because they were in many cases exclusive providers of services, and if not exclusive, at least dominant.[3]

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[1] 47 U.S.C. § 543(l)(2)

[2] 15 U.S.C. § 632(a).

[3] *See, e.g., Report and Order,* In the Matter of Regulation of Small Telephone Companies, CC Docket No. 86-467 (Released June 29, 1987), 2 FCC Rcd. Vol. 13 3811 at 3815 and *Sixth Report and Order and Eleventh Order on Reconsideration*, In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266 and MM Docket No 93-215 (released June 5, 1995) ("*Small System Order*").

Historically, the Commission has consistently made the determination of dominance at the local level. In this rulemaking, Congress mandates a company size standard measured at the national level. Because the cable industry on a national level is dominated by a few large MSOs,[4] the cable operators potentially impacted by the company size standard are simply not dominant when viewed on a national basis.

The analysis employed by the Commission in the *Small System Order* concluding that the SBA did not apply to that rulemaking is easily distinguished from this rulemaking. In the *Small System Order*, the Commission determined that the SBA did not apply for two reasons. First, as part of the 1992 Cable Act, Congress established a size standard (i.e., fewer than 1,000 subscribers) that precluded application of SBA. The Commission reasoned that providing relief to a greater population of operators than required by statute did not invoke the SBA. Second, the Commission reasoned that "[c]able systems subject to rate regulation are by definition dominant in their field of operation because they do not face effective competition."[5] In this rulemaking, Congress established a size standard that requires Commission rulemakings to establish its precise determination, making the Commission's contention that another statutory size standard had already been determined inapplicable. Further, Congress focused the company size standard at the national level where small cable has no dominance. Consequently, the provisions of SBA apply to this rulemaking.

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[4]As of December 31, 1995, the eighteen largest MSOs each had more than 617,000 subscribers. These MSOs provided service to approximately 51 million subscribers, or 83% of the national subscribers. National Cable Television Association, *Cable Television Developments*, Spring 1996 ed. at 14.

[5]*Small System Order* at ¶49.

C. The Commission must Seek Approval of Size Standards from the Administrator of the Small Business Administration.

The 1994 amendments to the SBA require that when the Commission promulgates any regulation defining a small business, the following procedures must be followed:

> Unless specifically authorized by statute, no Federal...agency may prescribe a size standard for categorizing a business concern as a small business concern, unless such proposed size standard --
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> (i) is proposed after an opportunity for public notice and comment;
>
> (ii) provides for determining, -- ...(II) the size of a business concern providing services on the basis of the annual average gross receipts of the business concern over a period of not less than 3 years; ...and
>
> (iii) is approved by the Administrator [of the Small Business Administration].[6]

In this rulemaking, the Commission is establishing a size standard that has not been established by Congress. Simply because Congress mandated that the agency undertake the task does not relieve the Commission from complying with the SBA.

The Commission appears to have complied with the SBA requirements to date as it has made the proposed size standard part of a notice and will receive comment. The Commission cannot, however, make the determination in isolation. It must seek the approval of its standard by the Administrator of the Small Business Administration.[7]

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[6]15 U.S.C. § 632(a)(2)(C).

[7]SCBA notes that the Size Standards Division of the Small Business Administration filed early comments regarding the size issues involved. These comments, however, were made without considering the record of public comments yet to be made in this proceeding. SCBA has already notified the Administration that its premature comments did not consider all relevant factors and that their reconsideration is essential. Consequently, the Commission cannot rely on those comments as

III. THE COMMISSION MUST CAREFULLY TAILOR THE DEFINITION OF "SMALL CABLE OPERATOR" TO AVOID BARRING ACCESS TO CAPITAL MARKETS.

A. An Over-restrictive Definition of a "Small Cable Company" Will Destroy the Benefits Intended by Congress.

Following the lead established by this Commission in the *Small System Order*, Congress recognized the legitimate need for reduced regulatory burdens on small cable by mandating greater deregulation for small cable companies.[8] Congress left a number of key definitional parameters for the Commission to establish. The Commission must undertake the challenging task of establishing these parameters in a manner that effectuates the relief intended by Congress without creating deleterious side effects.[9] As articulated in detail in these Comments, overly restrictive definitions will block small cable from many sources of capital, crippling not only those systems, but precluding millions of rural subscribers from receiving the enhanced and competitive services that are the hallmarks of the Act.

SCBA's primary concern focuses on the ability of small cable to access capital markets. Overly broad interpretations of the disqualification provisions will render meaningless the relief enacted by Congress, as small cable will face a Hobson's choice: obtain reduced regulatory burden and sacrifice the ability to raise capital or obtain capital but accept large company regulation. SCBA examines these issues more closely below.

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a surrogate for actual approval by the Administrator.

[8]Telecommunications Act of 1996 ("Act") at § 301(c).

[9]*See*, *Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Tel. Co.*, 464 U.S. 30, 36 (1983) ("As in all cases of statutory construction, our task is to interpret the words of th[e] statut[e] in light of the purposes Congress sought to serve . . .")

B. The Commission must Apply the Subscriber Cap in a Manner That Creates Stability and Certainty.

Only small systems owned by a qualifying small cable company are eligible for greater deregulation under the Act. Congress identified a number of attributes that establish the qualification parameters. One requirement limits the size of the cable operations that the company "directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States...."[10] The Commission has determined that currently operators serving fewer than 617,000 subscribers meet this requirement.[11] The Commission also proposes adjusting the amount on an annual basis and to use the number of cable subscribers as the national reference amount.

The Commission created the Form 1230 rate regulation structure for those cable companies that "did not have access to financial resources, purchasing discounts, and other efficiencies of larger companies."[12] Although not expressly stated, SCBA understands that Congress replicated the Commission's reasoning when establishing the subscriber limitation.

SCBA has no objection to the derivation of the initial total subscriber amount. SCBA does note, however, that the source cited by the Commission relied on Paul Kagan Associates, Inc. data that SCBA understands reflects **equivalent basic subscriber** data, not **total basic subscriber** data. An accumulation using total basic subscribers would result in an amount greater than 617,000. So

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[10]47 U.S.C. § 543(m)(1)(B).

[11]*Order and Notice of Proposed Rulemaking*, In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, CS Docket No. 96-85 (released April 9, 1996) ("*Order*" or "*NPRM*") at ¶26 (based on total current United States cable subscribers of 61.7 million).

[12]*Small System Order* at ¶28.

long as operators use equivalent basic subscriber counts, however, the reference amounts established by the Commission should provide adequate measures of small cable companies.

1. The Initial 617,000 Subscriber Limit Must Establish a Floor For Measures in Future Years.

For the regulatory relief provisions to have meaningful application, the qualification amount of 617,000 subscribers must establish a floor. Congress knew the approximate size of the cable industry when it enacted this provision. If not, one must assume that the 1% standard lacks a rational basis and is therefore unconstitutional, a presumption a federal agency is not permitted to make under the rules of statutory construction.[13]

The following example illustrates the public policy reasons supporting 617,000 subscribers as the minimum cut-off point:

> **Example**: Cable Company A serving 615,000 subscribers currently qualifies for treatment as a small cable company, presumably because it lacks sufficient size to have economies of scale and access to capital. If the number of national "cable" subscribers shrinks to 61 million next year due to competition from direct broadcast satellite ("DBS") or open video system ("OVS") providers, Cable Company A will no longer qualify for reduced regulatory burdens, presumably because it now has economies of scale and access to capital -- even though neither the company nor the subscribers it serves changed.

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[13]Federal statutes are to be construed as to avoid serious doubt of their constitutionality. *Crowell v. Benson* , 285 U.S. 22, 62 (1932). "[I]t is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by [which the question of constitutionality of the statute] may be avoided."

This interpretation makes no sense.[14] Only where the total number of national cable subscribers increases each year will the relief Congress intended not be undermined. If the competitive goals of Congress are met, the number of **cable** subscribers will decrease. One way to avoid a senseless application of the statute that disqualifies previously qualifying companies is to establish an absolute floor for cable companies at 617,000 subscribers. If the number of total cable subscribers drops below 61.7 million in future years, companies serving fewer than 617,000 subscribers will remain qualified for small company treatment.

The same analysis supports raising the floor in future years if the total number of national subscribers increases. Establishing size standards based on a percent of a national total will only create a stable environment where the national total either remains constant or increases. Once a company qualifies for treatment as "small," it should not lose qualification simply because the national index changes.

2. Define "Subscriber" to Include Customers of All Multichannel Video Programming Providers.

The Commission could, in the alternative, define the statutory term "subscriber" to include subscribers to all multi-channel video programming providers. This measure would not result in the aberrations illustrated above and would preserve the intended effect of the statute -- to relieve small companies of unnecessary regulatory burdens.

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[14]Doubtful provisions of a statute should be given a reasonable, rational, sensible and intelligent construction [*Alexander v. Cosden Pipe Line Co.*, 290 U.S. 484 (1933)] which avoids absurd consequences [*Perry v. Commerce Loan Co.*, 383 U.S. 392 (1966)].

3. Subscribers, the Commission and Cable Companies Benefit From Regulatory Certainty.

Providing certainty that companies with fewer than 617,000 subscribers will maintain eligibility for small company status benefits small cable companies, small cable subscribers and the Commission. The Commission has witnessed the consequences of uncertainty on small cable. Investors and creditors will shun small cable if they have no assurance that a company close to the 617,000 subscriber cut-off will retain qualification from year to year. Financial stability and strength allows operators to provide higher quality and quantity of service to subscribers. Also, companies near a cut-off point that fluctuates from year to year are likely to regularly seek waivers or clarifications about qualification, unnecessarily consuming valuable Commission resources.

C. Companies That Grow Beyond 617,000 Subscribers Should Be Afforded Transitional Regulatory Treatment.

Some small companies will grow beyond the 1% limitation during any given year. The change from deregulation to regulation can be dramatic. Sudden change in permissible revenue streams can cause financial instability and compromise the level and quality of service to subscribers. Some small companies may even halt growth to avoid "crossing the line." These companies should be afforded a smooth transition to regulated status as should other companies that lose small cable status.

1. Operators Should Not Face Rate Rollbacks, Only Regulation of Future Increases.

SCBA suggests that companies that grow beyond the 1% cutoff or become otherwise disqualified be permitted to maintain their basic rates, and limit future increases to regulated amounts. Specifically, operators could maintain their rates at levels existing when regulation takes effect and limit their future increases to those permitted under then existing regulatory schemes. For example, an operator becoming subject to regulation would be entitled to maintain its rates, but limit its increases to those allowed under either Form 1210 or 1240.

This proposal does no violence to statutory mandates and falls squarely within the Commission's authority to establish the parameters of "reasonable rates".[15] The statutory deregulation of certain rates for qualified systems of small companies demonstrates that Congress was less concerned with the rates they charged and more concerned with the burdens imposed by regulation. Just because a company ventures across the imaginary bright line that divides large and small companies, its rates should not automatically become "unreasonable". Rates permissible yesterday in a deregulated environment are no more burdensome to subscribers under a regulated environment today. Rather, the Commission should focus on ensuring the reasonableness of any future rate increases. Any attempt by operators to significantly boost rates immediately prior to the onset of regulation should be easily spotted by the Commission and actionable under the Commission's evasion enforcement authority.[16]

2. Transitional Rate Mechanisms Avoid Destabilizing Uncertainty and Avoid Creating a Disincentive to Growth.

A transitional mechanism is essential to prevent the destabilizing uncertainty that the Commission has previously attempted to eliminate from the regulatory framework. If potential investors and creditors suspect that a company will grow beyond the 1% limit, and if the impact on rates is uncertain, they will shy away from the investment. Absent transitional relief, the 1% limitation

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[15] 47 U.S.C. § 543(b)(1).

[16] 47 U.S.C. § 543(h).

becomes a disincentive for small cable companies to grow -- a result that runs contrary to the free market principles of the Act.

3. Transitional Regulation is Essential for Companies Growing at the Same Rate as the Industry.

Assuming that the cable industry continues to grow at its historical rate of 2.8%,[17] a company that currently approaches the 617,000 subscriber cap may find itself weaving in and out of regulation if it has a two or three percent growth rate. The prospect of this type of regulatory fluctuation has a particularly destabilizing effect as a small company could find itself in and out of regulation with rates potentially fluctuating each year. This type of fluctuation incites subscriber animosity, confusion and frustration. Transitional treatment for those companies that are only slightly over the annual cap will create the necessary stability.

D. An Overly Broad Definition of Affiliation Will Seriously Restrict Small Cable's Access to Capital.

1. The Act's Definition of "Affiliate" Does Not Govern Affiliations for Purposes of Title VI.

SCBA supports the Commission's tentative conclusion that it must develop its own standards to identify "affiliations" because the Act's 20% standard does not apply to Title VI regulation.[18] The Title VI definition of "affiliation," which predated the Act's definition, states:

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[17]Computed based on the increase in the total number of subscribers over the past five years using data from *Cable Television Developments*, Spring 1996, National Cable Television Association at 2.

[18]*NPRM* at ¶82.

> the term "affiliate," when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person;[19]

The provision in Section 3 of the Act establishes a different definition of "affiliate" that applies "[f]or purposes of this Act, unless the context otherwise requires. . . ."[20] SCBA agrees with the Commission that the Act's definition of "affiliate" does not strictly apply to matters under Title VI, since Title VI contains a separate definition of the term that, unlike the Title I definition, does not set a percentage threshold as to what constitutes ownership.[21]

2. The Commission must Consider the Impact on Access to Capital.

The second major qualification for treatment as a "small cable company" restricts the size of the company with which the operator may have a financial relationship:

> [a small cable company may not be] affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.[22]

If a financial relationship with minimal nexus gives rise to an "affiliation," then many major sources of capital will lock their vaults when small cable comes calling. Many larger institutional investors have provided capital in the past, but now such capital could cause small operators to lose the benefits intended by Congress.

Such a result runs contrary to the concerns previously articulated by the Commission. Looking back to the Commission's first attempt at small cable relief, the Commission provided relief

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[19]47 U.S.C. § 522(2).

[20]Act, § 3(b).

[21]*NPRM* at ¶82.

[22]47 U.S.C. § 543(l)(B)(2).

for that group of cable companies that it believed could not access sophisticated capital markets.[23] Access to capital has remained a consistent concern of the Commission, even as it crafted its most recent small cable provisions.[24]

3. The Commission must Distinguish Between Active and Passive Interests.

Investments can and must be divided into two groups: (1) active; and (2) passive. At one end of the spectrum, active investors are owner/operators of cable systems. These owner/operators put their own money into cable and run the day to day operations. Completely passive investors reside at the opposite end of the spectrum. A truly passive investor has no involvement in the operation of the business, either day to day or general policy and strategy development.

The distinction between those who invest to earn a return and those who invest to run a business is crucial to fulfillment of the overall intent of Congress. Congress imposed the affiliation standard to avoid a concentration of media power in certain companies resulting from cross-ownership by an owner involved in the day to day operations of the business.[25] Beginning with the 1992 Cable Act, "Congress made clear its belief that small systems would be in need of administrative

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[23]Second Order on Reconsideration, MM 92-266, FCC 94-38 (released March 30, 1994) at ¶157.

[24]*Small System Order* at ¶28 ("our relief for small cable entities is aimed at those that do not have access to the financial resources, purchasing discounts, and other efficiencies of larger companies").

[25]The affiliation restriction was introduced in the final draft stages of the compromise legislation. Consequently, no written legislative history exists. SCBA, however, was intimately involved in the legislative process and offers for the Commission's consideration, its understanding of the reasons this restriction was incorporated.

and rate relief as a consequence of the reregulation of the cable industry."[26] Congress greatly enlarged the scope of the systems eligible for relief by allowing up to 50,000 subscribers per franchise area and 617,000 subscribers per company.[27] The only conclusion that one can draw from the consistent direction of Congress is that the purpose of these statutory provisions was to expand relief for small cable. To effectuate the purpose of the statute, the small cable provisions should be interpreted to provide maximum protection for the greatest number of small operators.

Many large institutional investors hold significant equity positions in small cable. The vast majority of these have no involvement in the day to day operations, or even strategic planning; their investment postures are truly passive. Typically, the only involvement these institutional investors have occurs when the investment under-performs and an investor seeks to exit the relationship. Even then, institutional investors typically limit their involvement to issuing instructions to find replacement equity or to sell the company. The Commission must recognize the significant difference between an investor who actively involves itself with the running of the cable business and the investor who merely manages its portfolio. Deciding whether to exit an investment does not change its passive nature.

Excluding otherwise qualified small cable companies because they have passive institutional investors with more than $250 million of gross annual revenues will substantially shrink the list of qualifying cable companies. Such a limiting interpretation is inconsistent with the overarching policy

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[26]*Small System Order* at ¶26 (referencing the provisions for systems with 1,000 or fewer subscribers).

[27]47 U.S.C. § 543(l)(B).

objectives articulated by Congress.[28] Passive interests, irrespective of degree, should never trigger the existence of an affiliation.

a. The Ability to Control Operations, If Not Historically Exercised, Should Not Affect the Classification of a Truly Passive Investment.

If an investor has historically treated an investment in a passive manner, the Commission should not consider the relationship with the investor an "affiliation." The nature of how the investor exercises the investment should govern, not technical points of "control" that exist in typical investment agreements. Consequently, the percentage of voting interests or other control factors should not govern if the investment is held in a passive manner. The following example demonstrates this point:

> **Example**: The Cable Management Company ("Management Company") has learned that a prime 20,000 subscriber system is on the market for $48 million. Management Company will establish a separate corporation to buy the system ("Holding Company"). Its equity will come 65% from the Longterm Life Insurance Company ("Insurance Company") and 35% from a private local investor. Insurance Company will have majority voting and equity distribution rights, but it knows nothing about cable operations and knows that Management Company has a good track record. Management Company and Insurance Company are completely unrelated. The system is acquired and the Holding Company enters into a long-term contract for Management Company to operate the system. The management contract may be

[28] It is important that the Commission's rules be promulgated with due regard for Congressional policy objectives. *Norfolk, supra.*

terminated by Holding Company for cause, however. Because Insurance Company will assume a completely passive posture, its interest and ability to terminate the Holding Company should not give rise to an "affiliation."

The mere fact that an investor has the control to hire and fire the management company bears no relevance on whether an affiliation exists so long as the management company and the investor have no relationship.[29]

b. The Commission Should Establish Guidelines to Identify Passive Investments.

The ultimate test of whether an investment is actively or passively held is determined based on the extent to which the investor **exercises** indicia of control. The Commission can clarify how investments will be classified by issuing guidelines illustrating the factors that will give rise to an affiliation. Nevertheless, contested cases will require the Commission to make case by case determinations. This additional effort is justified, however, for without a flexible passive interest provision, a significant number of cable operators would lose the benefit of reduced regulation.

SCBA recommends the following affiliation guidelines:

> An investor shall not be considered an affiliate of a cable system for the purposes of small cable company deregulation so long as that investor remains a passive investor. A passive investor is one that:
>
> > Has no material involvement in day to day management of the cable company;
> >
> > Has no material involvement in strategic planning for the cable company; and

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[29]The relevant relationship is that between the investor and the management company. In some cases, the management company may have an investment in the cable system as well. This common investment interest in the cable system does not run to the matter of affiliation and should bear no relevance to the analysis of whether an "affiliation" exists.

> Does not exercise direct control over the management of the cable company notwithstanding any rights of termination in any management agreements or foreclosure or control in any loan documents or other investment agreements.

Under this proposed framework, SCBA recognizes that the classification of an investment may change over time. If, for example, an historically passive investor with the right to exercise control begins to involve itself with active day to day management issues, that investor becomes an active investor. Depending on the circumstances, this may cause the Commission to declare that an affiliation exists. Again, the flexibility required by this framework is essential to ensuring that only those relationships necessary to be classified as an "affiliation" are so classified.

4. Active Investments Should Constitute an "Affiliation" Only above 50% or When De Facto or De Jure Control Exists.

The ability to exercise control should determine whether an "affiliation" exists where the investor maintains an active involvement in the operation of the cable business. The Commission has previously established such levels at 20%.[30] This threshold is too low.

a. For Active Investments, the Commission Should Adopt the Small Business Administration Affiliation Regulations.

SCBA encourages application of the affiliation rules established by the Small Business Administration where active investment exist.[31] Under these rules, an affiliation only exists where "A

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[30] *NPRM* at ¶26.

[31] 13 C.F.R. § 121.401 (copy enclosed as Exhibit A). SCBA's recommendation goes only so far as those rules determining whether investors are affiliated with the company in which they hold an investment. SCBA addresses issues related to common management of individual companies later in these comments.

third party or parties controls or has the power to control both...."[32] The regulations further explain the rationale behind the Small Business Administration test:

> Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.[33]

Under this test, an investor with less than 50% voting equity can have control. The percentage of the investment required to have control will vary on a case by case basis. Protection of small cable requires a flexible approach. Investors, however, will also require a degree of certainty as a prerequisite to investing time and effort into discussions regarding potential investments.

The Small Business Administration regulations were previously adopted by the Commission when determining whether affiliations existed among companies and their investors for Broadband PCS providers.[34] The purpose of those affiliation rules was to ensure that only truly small companies received PCS bidding preferences. The purpose of the affiliation rules under the Act is identical: To ensure that only truly small cable interests obtain greater deregulation. Adoption of applicable portions of the Small Business Administration regulations is appropriate and consistent with Commission precedent.

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[32] 13 C.F.R. § 121.401(a)(2)(ii).

[33] 13 C.F.R. § 121.401(c).

[34] *Fifth Report and Order*, In the Matter of Implementation of section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253 (released July 15, 1994) at ¶¶204-217.

Exhibit C

b. The Commission Should Establish a Two-Tiered System to Create Certainty Among The Investment Community.

To provide both flexibility and certainty, SCBA suggests a two-tiered test to determine whether an active investment will qualify as an "affiliation:"

(1) 20% and Less - Presumptive Safe Harbor.

The Commission should declare that any voting interest of 20% or less shall not constitute an affiliation, absent a showing of de facto or de jure control.

(2) 20%-50% - Affirmative Showing of No Control.

The Commission should permit operators to make an affirmative showing that voting equity interests above 20% but not more than 50% do not constitute an affiliation due to absence of actual control or the power to control.

Some small cable companies have investors who take an active role in the operations of their cable systems. These relationships will more frequently rise to the level of an "affiliation" as contemplated by Congress.

E. When an Affiliation Exists, the Commission must Exercise Care to Measure Only Relevant Revenues to Avoid Unnecessarily Foreclosing Access to Capital.

Congress required more than the presence of a mere affiliation to disqualify a small cable company from receiving reduced regulatory burdens. The affiliation must be with an entity "whose gross annual revenues in the aggregate exceed $250,000,000."[35] Several key measurement issues, some of which have already been identified by the Commission, need to be resolved.

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[35] 47 U.S.C. § 543(l)(B)(2).

1. The Commission's Proposed Definition of Gross Revenues Is Appropriate.

The Commission proposes using a previously promulgated regulation as the model to define gross revenues:

> Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited quarterly financial statements for the relevant period.[36]

SCBA agrees that this traditional accounting definition of "gross revenues" is appropriate for purposes of the Act. SCBA takes exception, however, with the requirement of providing audited quarterly financial statements.

Where questions regarding eligibility exist, the most recently compiled annual financial statements should provide adequate information. This avoids the cost of preparing quarterly statements solely for regulatory purposes. The Commission should not require audited statements as many such statements are not currently audited and having them certified would cost a considerable sum. SCBA suggests that operators provide published financial data where available, and rely on personally signed declarations should qualification questions arise.

SCBA suggests that to verify the gross revenue of natural persons investing in small cable companies that the Commission use the most recently filed federal income tax return to gauge the amount of gross revenues. This disclosure should be made only where serious questions arise as to whether the individual has gross revenues exceeding $250 million. Routinely, an individual should be permitted to submit a signed declaration, under penalty of perjury, that his/her gross annual receipts do not exceed $250 million annually.

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[36]*NPRM* at ¶84, citing 47 C.F.R. § 76.720(f).

2. The Act Does Not Require Aggregation of Affiliate Revenue.

The Commission mistakenly states that "[t]he plain language of the statute appears to require an operator with multiple affiliates to aggregate the gross annual revenues of all of the affiliates and to compare this aggregate figure to the $250 million threshold."[37] This is one of two possible interpretations of the statutory provision. The provision states that a small cable company may:

> not [be] affiliated with any entity or entities whose gross annual revenues in the aggregate exceeds $250,000,000.[38]

A close examination of the clause shows its meaning. The phrase "entity or entities" clarifies that an affiliation with one or more disqualifying entities may prohibit a small cable company from availing itself of small cable relief. The word "aggregate" applies to the revenues of each entity individually. SCBA admits that two possible readings of the statutory language exist.[39]

The Joint Committee Report sheds further light on the meaning of the statute. It provides that a qualified small cable company may:

> not be affiliated with any entity whose annual gross revenues in the aggregate exceeds $250,000,000.[40]

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[37] *NPRM* at ¶86.

[38] 47 U.S.C. § 543(l)(B)(2).

[39] Where an ambiguity exists and interpretation is necessary, the words of the statute should be interpreted in light of the purposes Congress sought to serve. *Norfolk, supra*. *See also Moskal v. United States*, 498 U.S. 103 (1990); and *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust*, 124 L.Ed.2d 539, 567 (1993) ("Having found the statutory language itself incoherent, we turn, as we would in the usual case of textual ambiguity, to the legislative purpose as revealed by the history of the statute . . .")

[40] Joint Committee Report, § 301.

This passage clearly indicates that Congress intended to disqualify a small cable company if it had an affiliation with **any single entity with gross revenues exceeding $250 million**. The Committee Report language uses the word "aggregate" in the context of a single entity, showing Congress' intent to merely require aggregation of the affiliates own revenues. The Joint Committee Report does not support the Commission's tentative conclusion that the revenues of all affiliates be aggregated between affiliates.

SCBA's interpretation of this provision is also consistent with the overarching intent and purpose of the Act to provide relief to an increasing number of cable companies. The intent of Congress was to limit the eligibility of small cable companies that had affiliations with (i.e., were controlled by) very large enterprises. To require aggregation would deprive many other small cable companies of greater deregulation, contrary to the intent of Congress. Any company that needs to assemble a group of investors will more quickly trip over the $250 million gross revenue limitation.

The following example illustrates some of the problems created by aggregating gross revenues of affiliates:

> **Example**. Small Cable Company ("Small Company") has five equity investors who maintain active involvement in the management of the business. Four corporations each hold a 25% voting equity share. Each company has $100 million in gross annual receipts. Individually, each does not disqualify Small Company. Together, however, the gross annual receipts total $400 million.

One of the consistent reasons small cable companies have received relief in the past relates to difficulties small companies have attracting capital. Presumably, if a small company is affiliated with a large company, the small company's access to capital will be enhanced. The above example demonstrates how the aggregation of revenues as proposed by the Commission gives a false positive indication. Aggregated, the gross revenues total $400 million. Yet, when each investor goes into the capital markets, it will receive treatment as a $100 million company. Congress intended that affiliation with a $100 million company should not disqualify a small cable company. The Commission should not strip away the benefits of such affiliations.

If the Commission still believes that it must aggregate the gross revenue of affiliates, it should at a minimum permit operators to compute the gross revenue attribution using a multiplication of the ownership interest of each affiliate. In the preceding example, each affiliate would have 25% of its gross revenues attributed to the cable operator, then 25% of each affiliate's gross revenue will flow into the gross revenue accumulation. Consequently, the aggregate gross revenues would total $100 million. If the Commission does not discount the gross receipts for smaller ownership percentages where multiple affiliates exist, small cable companies who must assemble consortiums of investors will likely find capital formation must more difficult, if not impossible.

3. The Act Excludes Revenues of the Cable Operator from the Gross Revenue Accumulation.

Including the revenues of cable operations in the affiliation gross revenue limit conflicts with the goals of Congress as most larger small cable companies will never qualify for small company status. Congress established a bright line initial qualification for small cable company status of 1% of national subscribers.[41] The Commission has determined that this amount initially totals 617,000 subscribers.

[41]47 U.S.C. § 543(l)(B)(2).

The subscriber cap and the gross revenue limit are interrelated. The 1% subscriber cap and the $250 million revenue cap are both indications of cable companies of approximately the same size. For example, a $250 million cable company with 617,000 subscribers, would have average monthly revenue from subscribers of $33.76.[42] Paul Kagan Associates estimates the 1996 average revenue per subscriber will be $32.69.[43] The similarity of these amounts is not coincidental.

If the Commission includes cable company revenue in the aggregation, the larger the cable company, the smaller the size of its affiliates. This effect, as shown in the following table, serves no public policy interest. Rather, it conflicts with the public policy goals articulated by Congress:

Subscribers	**Cable Revenues**	**Affiliate Revenues**	**Total Revenues**
10,000	$3,922,800	$246,077,200	$250,000,000
200,000	$78,456,000	$171,544,000	$250,000,000
400,000	$156,912,000	$93,088,000	$250,000,000
600,000	$235,368,000	$14,632,000	$250,000,000
617,000	$242,036,760	$7,963,240	$250,000,000

Including the cable operating revenues in the revenue aggregation renders the 1% subscriber cap redundant and therefore superfluous.[44] As the size of the cable operator grows, its ability to attract capital from qualified investors shrinks. As the table shows, a 600,000 subscriber cable

[42]$250 million/617,000 subscribers/12 months.

[43]Paul Kagan Associates, Inc., *The Cable TV Financial Databook*, July 1995 at 8.

[44]The legislature is presumed to have inserted every word and clause of a statute for a purpose and the statute must be construed to give effect to every word and clause. *Moskal, supra*. A statute should not be construed in such manner as to render it partly ineffective or inefficient if another construction will make it effective. *United States v. Powers*, 307 U.S. 214 (1938).

operator has a business grossing approximately $235 million. Yet it can only seek investments from companies with 94% lower revenues than the cable company! These very small companies will not have capital available to invest in small cable. As a practical matter, no company with over 300,000[45] subscribers would ever qualify for small company treatment.

This same analysis supports the proposition that Congress intended the $250 million gross revenue limitation to apply to individual companies, not cumulatively.

4. Qualification of Related Entities Should Be Determined on an Entity by Entity Basis.

Many MSOs operate systems that are owned by different investment groups. Unlike the largest MSOs that typically operate under a parent-subsidiary structure, often the company bearing the MSO name is nothing more than a management company. The management company may have some degree of equity investment in each cable system group, or may be the general partner of the limited partnerships.

Focusing on the relationship between the cable operator's systems and the investor, some investors may have more than $250 million in gross annual revenues, potentially disqualifying that system from receiving small cable regulatory relief. If a particular group of systems with common investors is disqualified, that disqualification should not impute to the balance of the systems. Each financially autonomous system should receive a separate evaluation to determine its eligibility for small cable relief under the Act.

[45]At approximately 300,000 subscribers, the cable operator size begins to exceed the size of the investing entity.